



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 42 OF 2018**

*(Before D. K. N. Marete)*

**ALEXANDER KIMUTAI ROTICH.....CLAIMANT**

**VERSUS**

**GOVERNOR, COUNTY GOVERNMENT OF KERICHO.....1ST RESPONDENT**

**THE CHAIRMAN KERICHO**

**COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of claim dated 30th January, 2018. It does not disclose any issue in dispute on its face.

The respondent in a Statement to Response to the Memorandum of Claim dated 11th June, 2018 denies the claim and prays that it be dismissed with costs.

The claimant's case is that in the year 2013, the 2nd respondent in the daily newspapers advertised for the position of Chief Officers for Kericho County Government. Thereon, the claimant applied and was after interview on the vetting appointed as Chief Officer, Department of Trade, Industrialization, Co-operative Management, Tourism and Wildlife.

The claimant's further case is that on 18th April, 2015, he was issued with a letter setting out his terms of service, duties and remuneration as a Chief Officer as a member of the County Public Service Board. He served as such until 19th December, 2017 when he received a letter of expiry of contract informing him that his contract was to expire on 21st December, 2017.

The claimant's other case is that at the time of appointment and acceptance of the same, his understanding was that he would serve for a full term of 5 years under the medium term appointment as stipulated under the Public Service Commission, County Public Human Resource Manual, 2013.

The claimant's further case is that sometimes in the month of August, 2017, without any notice to him, the respondents advertised for the positions of Chief Officers, Kericho County Government and conducted interviews for those positions on 28th September instant.

The claimant's other case is that his office was to fall vacant on 21st March, 2020. Further, this position could only have been terminated the County Public Service Board and not the County Governor. The letter from the Governor informing him of the expiry of contract was irregular as the said governor was not his employer.

The claimant therefore seeks a declaration that the letter of cessation of contract dated 19th December, 2017 was unlawful, null and void. He further seeks reinstatement to employment and order restraining the respondents from declaring his position vacant and also canceling any purported recruitment of any other person to the claimant's office.

In the penultimate he prays as follows;

*a) A declaration that the notice of expiry of the contract of employment of the Claimant in the Kericho County Public Service was illegal null and void as the contract period of the Claimant was for a full term of 5 years as per the County Public Service Human Resource Manual.*

*b) An order declaring the recruitment of another Chief Officer to take the position of the Claimant before the expiry of the contract of employment of the Claimant as illegal and a contravention of the rights of the Claimant as enshrined in the Constitution and relevant status.*

*c) An order restraining the Claimant to the position of Chief Officer County Government of Kericho until the 31<sup>st</sup> March, 2020 when his tenure as a Chief Officer will lapse.*

*d) An order for payment of unpaid salaries due to the Claimant from the month of January, 2018.*

*e) Costs of this cause.*

*f) Any other relief this Honourable court may deem fit to grant.*

The respondents' case is a denial of the claim.

The respondents, however, admit that the claimant was an employee of the Kericho County Government Public Service Board as Chief Officer, Department of Trade, Industrialization, Co-operative Management, Tourism and Wildlife to which he was appointed on 16th March, 2015 by a letter of even date.

The respondents' further case is that the letter of appointment was issued pursuant to Section B. 11(1) of the County Public Service Board Resource Manual of May, 2013. It is their case that they would seek to rely on this during the hearing of the claim.

The respondents' other case is that the claimant was recruited to serve on a medium term employment pursuant to Section B. 15 (1) of the said manual. The manual at Section B.2(1) provides for categories of employment as follows;

*i. Permanent and Pensionable Employment,*

*ii. Medium Term Appointment (1 – 5 years renewable contract),*

*iii. Short-Terms Appointment (casual, hourly and daily paid.)*

*b) The Claimant was recruited to serve on medium term employment pursuant to Section B.15 (1) of the manual.*

*c) Under Section B.15(2), the manual provides that an officer whose services are still required, will be given a 3 months' notice.*

*d) Under Section B.15(3), the manual provides that an employee serving medium term contract, will be kept for a maximum period of 5 years. Such contracts can be renewed for a further period of five years, once. This is read together with Section B.15(2).*

*e) The Claimant served for a period of 2 years and 9 months, well within the period of contract. The Claimant was not entitled to be in office for the maximum period of 5 years. The manual's provisions under Section B.15(3) does not provide for a mandatory term of 5 years; provided that where the contract is due to expire, the Claimant is given notice.*

*f) The Claimant was therefore given notice of the expiry of the contract on 17<sup>th</sup> December 2017.*

The respondents' case is therefore a denial that the claimant was entitled to a 5 year stint of service as claimed. Moreover, and pursuant to knowledge that his contract was set to expire, the claimant applied for the 13 posts of Chief Officers advertised by the 2nd respondent on 20th August, 2017 and his application was received on 8th September, 2017. This was subsequently rejected for his not being the most favourable on merit. This suit therefore remains an afterthought and as a consequence of his failure to secure appointment on application.

The respondent's in the penultimate disclaim breach of any laid down rules and regulations and aver that they acted in total compliance of the law.

They pray as follows;

*a) The Memorandum of Claim be hereby dismissed;*

*b) The Court do make a provision for the 1<sup>st</sup> and 2<sup>dn</sup> Respondent's costs, of and incidental to this suit;*

*c) Any further relief that this Honourable Court may deem fit to grant.*

The matter came to court variously, until 16th July, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the contract of employment of the claimant was or was not for 5 years?

2. Whether the recruitment of another Chief Officer to take the position of the claimant before the expiry of his contract of employment is illegal and a contravention of his statutory and constitutional rights?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of the cause?

The 1st issue for determination is whether the contract of employment of the claimant was or was not for 5 years. The claimant in his written submission dated 20th August, 2018 submits in reiteration of his claim. He seeks to rely on Section B.15(1), B.15(2), and B.15(3) besides B.10(1) and B.11 all in support of his employment and term thereof. This was at all times a medium term employment and carried its inhibitions, constraints and various other terms.

The respondents' in their written submissions dated 28th November, 2018 also comes out and submit in reiteration of their case. It is their case that the County Governor has powers to terminate the contract of the claimant by virtue of the provisions of the County Governments Act, 2012 which at section 45 provides as follows;

45. *Appointment of county chief officers*

(1) *The governor shall-*

(a) *nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and*

(b) *with the approval of the county assembly, appoint county chief officers.*

Further, the respondents' submit that the claimant was not entitled to serve the full term of the contract but were only entitled to serve at the pleasure of the governor as direct employees. Anything to the contrary violates the sanctity of executive authority of appointment. A one month notice of the intended expiry of the contract of the claimant was adequate and served to validate the termination of appointment.

The respondent's in further support of their case sought to rely on the authority of **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014]eKLR** which comes out as follows;

*This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being.*

63. *In dealing with laches, Halsbury's Laws of England, 4<sup>th</sup> ed. Vol. 16(2) at 910 has this to say;*

*" A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable dealy (laches").*

64. *Lord Selbourne L.C. delivering the opinion of the Privy Council in The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221 said at page 240:*

*"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."*

Further, the respondent relied on the authority of **Rajnikanthkhetshi Shah v Habib Bank A.G. Zurich [2016]Eklr** where the court observed as follows;

*In law waiver of a right or relief may be express or implied. Almost no difficult arises where the waiver is made expressly by consent and the party benefiting from it has acted on upon it: that is sufficient consideration. Where waiver is not express and is to be implied from the conduct of the parties, the court has to consider the entire circumstances of the case to establish conduct which is inconsistent with the continuance of the right. See The Laws of England, eds. Viscount Simonds, Vol. 14, London: Butterworth & Co. [1956] para 1175. That is the law on waiver. I will now re-state the concept of acquiescence. According to the Laws of England (ibid) para 117:*

*"The term "acquiescence" is used in two senses. In its proper legal sense, it implied that a person that a person abstains from interfering while a violation of his legal rights is in progress; in another sense implies that he refrains from seeking redress when*

*availing of his rights, of which he did not know at the time, is brought to his notice. Here the term is used in the former sense; in the second sense acquiescence is an element in laches”.*

When all is said and done, and without belaboring the point, the actions of the respondents’ take favour of the law. This is because Section B.2(1) of the County Public Service Board Resource Manual of May, 2013 clearly establishes the law under which the claimant was employed. This did not wholly or automatically provide for a full five (5) year stint of service as such Chief Officer. The terms of service were variable and allowed the contract to last any period upto and including a maximum of five years. This claim on this ground alone comes to a cropper. It fails.

Coupled with the respondent’s elaborate and emboldened case and submissions on the doctrines of waiver, estoppel and laches, this dilutes the claimant’s case in the circumstances. He was always warned of his rights but gave up the same in favour of other pleasures. He cannot now be heard to come back and reclaim the same. He is so estopped.

This comes with a finding that clearly, the employment and terms of service thereof for the claimant as Chief Officer were never intended to last five (5) years. This was a flexible term where either party, and particularly the appointing authority had the power and authority to terminate the contract during its course and before the expiry of the term.

The 2nd issue for determination is whether the recruitment of another Chief Officer to take the position of the claimant before the expiry of his *contract* of employment is illegal and a contravention of his statutory and constitutional rights. In the circumstances of the finding on the 1st issue above, this becomes a non issue. It is not the subject matter for any further debate.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of his term of contract and unlawful termination of the same, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the same.

**Delivered, dated and signed this 1st day of February, 2019.**

**D.K. Njagi Marete**

**JUDGE**

Appearances

1. Mr. Ndubi instructed by Robert Ndubi & Company Advocates for the claimant.
2. Mr. Kebero instructed by Manyonge Wanyama & Associates Advocates for the respondent.